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In the
Supreme Court of the United States

OCTOBER TERM, 1983

ARLAN LAMAR ROBINSON

Petitioner,

versus

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Is the sentence imposed herein violative of Petitioner's Eighth and Fourteenth Amendment rights under the facts and circumstances of the case, and is such sentence a result of the bias and prejudice of the trial judge as evidenced by his actions and comments throughout the trial?

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JURISDICTION AND OPINIONS BELOW

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on February 28, 1983, and the opinion of the Court is reported at 700 F.2d, 205. A supplemental opinion was entered on August 17, 1983, and is reported at __ F.2d __. Copies of both opinions are annexed hereto. The Order denying the Petition for Rehearing and Rehearing En Banc was entered on October 19, 1983, and the Order denying Petitioner's Motion for Stay of Mandate was entered on October 27, 1983. Copies of those orders are also annexed hereto. The jurisdiction of this Court is invoked under 18 U.S.C. §3771 and 18 U.S.C. §3772, and Rules 19 and 20, Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT VIII

"Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishment inflicted."

AMENDMENT XIV, Section 1

"...nor shall any state deprive any person of life, liberty, or property without due process of law..."

STATEMENT OF THE CASE

The Petitioner, Arlan Lamar Robinson, a county supervisor for District Five, Harrison County, Mississippi, since 1968, was indicted on January 7, 1981 in the United States District Court for the Southern District of Mississippi, in a five-count indictment charging him with three (3) violations of the Hobbs Act (18 U.S.C. §1951) and two (2) counts of making false statements (18 U.S.C. §1001).

The trial of this matter commenced on December 7, 1981, and was concluded on January 5, 1982, when the jury returned a verdict of 'guilty' on Counts One, Four, and Five, and acquitted Mr. Robinson on Counts Two and Three.

Petitioner prosecuted a timely appeal. On February 28, 1983, the Fifth Circuit Court of Appeals rendered its opinion affirming Counts Four and Five, and remanding with instructions as to Count One. The Circuit Court remanded Count One with the following instructions:

> "The trial judge shall certify to us his findings and conclusions. The record shall be supplemented by the on-the-record determination herein prescribed, and by any materials submitted by the parties to the district court. Following such filing, the clerk will set a schedule for supplementary disposition." *U.S. v. Robinson*, No. 82-4098, Slip. Op. Footnote 12, at 3074 (5th Cir. Feb. 28, 1983).

Subsequent to an orderly filing of memorandum briefs, the district judge heard the oral arguments of the parties on May 3 1983. Less than three (3) full days later, the district judge completed his *Certification in Response to Court of Appeals Question Under Federal Evidence, Rule 404(a)(b).* Said Certification was filed with the Clerk of the United States District Court, Southern District of Mississippi, on May 9, 1983.

On August 17, 1983, the Court of Appeals held that the requirements of Rule 404(b), as explicated in *Beechum*, weighed in light of Rule 403, were marginally satisfied and affirmed Count One. A Petition for Rehearing and a Suggestion for Rehearing En Banc were timely filed. Both were denied on October 19, 1983.

The sentence was ten (10) years on Count I, two (2) years on Count IV, two (2) years on Count V, all to run consecutively; as well as a $30,000.00 fine and cost of prosecution ($15,000.00). The fine and costs have been paid, and Petitioner began serving his sentence on December 5, 1983.

ARGUMENT

Is the sentence imposed herein violative of Petitioner's Eighth and Fourteenth Amendment rights under the facts and circumstances of the case, and is such sentence a result of the bias and prejudice of the trial judge as evidenced by his actions and comments throughout the trial?

The trial of the Petitioner is replete with prejudicial comments and rulings by the trial judge. While it is impossible to reproduce all in this Petition, Petitioner feels it is important to point out at least some of the trial judge's comments.

At the conclusion of the government's case, Petitioner's counsel announced to the court that he was not ready to proceed. This occurred because the government's close came sooner than expected. In commenting on Petitioner's request to recess the proceedings until the following day, the trial judge became visibly annoyed, and announced:

> "I never have seen such lousy co-ordination of counsel, and I denounce both sides of you for that. (Trial Record, p. 366).
>
> "I'm extremely annoyed." (Trial Record, p. 367)
>
> "Well, you go ahead with your motion. I don't care about any of your discussion." (Trial Record, p. 367).

Petitioner's counsel then attempted to make a Motion for Judgment of Acquittal, pursuant to Rule 29, Federal Rules of Procedure. The following colloquy between

the trial judge and Petitioner's counsel is indicative of the judge's state of mind and succinctly underlines his predisposition to adjudge the Petitioner guilty.

At page 368, Trial Record:

"By the Court:

You got a motion to make?

By Mr. Fawer:

Yes, your Honor.

By the Court:

You'd better start making it.

By Mr. Fawer:

I move, pursuant to Rule 29 of the Federal Rules of Criminal Procedure --

By the Court:

Overruled."

Incredibly, the judge indicated a disposition to overrule Petitioner's motion before counsel was even allowed to state the motion or the grounds. There is absolutely no adjective to properly characterize that type of judicial impatience or conduct.

Fortunately Petitioner was able to make his motion and arguments to the court. After arguments, the judge's ruling was made. He did not make a decision pursuant to the rules and case law; he did not construe the evidence, as

required; and his ruling is devoid of any legal basis but only reflective of the bias and prejudice which prevaded his conduct of the trial. The judge's decision (at page 382, Trial record) is reported as follows:

> "By the Court:
>
> Gentlemen, *in these superviosr cases, and I've had several of them. I got accustomed to having some kind of irregularity in the supervisors on the Coast. It's a bad section of the state so far as supervisors are concerned.* I don't think that it behooves the Court to discuss the merits of this or any other case. I realize it behooves me to pass on this motion that counsel for the defendant has made for an acquittal. Frankly, I think that with deference to Mr. Fawer, he's a very earnest solicitor and presents his case well, but frankly, I think that this is a matter on all five counts to be presented to the sound judgment of this Jury. And I don't believe there's any way to explain the duty of a court to take a case like this from a jury and I'm not going to do that." (Emphasis added).

It is obvious from the first paragraph of the judge's ruling that his decision was, in some measure, made not on the evidence that he had heard in the courtroom but on his perception of the 'irregular actions' of all supervisors in what he described as "...a bad section of the state so far as supervisors are concerned." (Trial Record, *supra.)*

Again, at the sentencing of Petitioner, counsel made a motion for judgment of acquittal, pursuant to Federal Rule 29(c). In ruling on the motion, the trial judge said:

> *"I think this kind of treatment of the county, though, is a kind of way of life on the Gulf Coast,*

> because he's not the first supervisor I've had before me. He's the second or third one. I don't believe I got my thoughts over to the other supervisors. Of course, I haven't had one on the Hobbs Act before, *but I think I should write a very brief memoranda, which I shall do in this particular case.*" (Motions and Sentencing Record, p. 20). (Emphasis added).

Obviously the 'memoranda' was the decision the court had already made to impose the maximum sentence without regard to matters brought to the attention of the court by counsel and the Petitioner himself.

Illustrations of the court's actions and reactions are sprinkled throughout the record. One example is cited here from page 1890:

"By the Court:

> You gentlemen quieten down. I won't have any of this. I'll lock all of y'all up. I'm not going to have any conduct like this. Where do you think you've been practicing? Who do you think you are? I'm talking to all of you. Now you settle down. You answer the question—ask the questions properly as a lawyer under oath, and it'll be answered, but you start some of your business here again I'm going to lock your whole crowd up. I'm getting tired of this lousy kind of conduct here."

This comment was made in the presence of the jury, as was a further comment by the judge that he had never seen such false swearing by witnesses in a case since he had been on the bench.

The trial judge's reaction to the Petitioner, throughout the trial, can only be characterized—for lack of a better word—as off-center. Very early in the case, while hearing pretrial motions, attorneys for the government and the Petitioner were discussing with the judge the matter of the assignment of the case *sub judice.*

In commenting on recusal of the other two judges, the trial judge (at page 3) commented:

> It's not embarrassing to me one bit, but I know Mr. Robinson of old and he certainly has nothing to fear from me because we had a little difficulty and he settled it very satisfactorily to me and I certainly have no feelings or ill will of any kind, so he's presumed to be innocent so far as I'm concerned.

The "little difficulty" referred to was a highly publicized case wherein the judge ordered the Petitioner to replace palm trees on the sand beach in Biloxi which had been removed by Petitioner, who believed they had been placed on the beach in violation of a court order issued by the same trial judge.

It is difficult to square the comments cited above with the language of the Anent Appearance Bond in the Fifth Circuit by the trial judge. In that opinion, the judge wrote:

> "I never knew him [Robinson] except by reputation."

Viewed cumulatively, the prejudicial actions cited above substantially influenced the verdict and judgment against

Petitioner in this case, and create serious doubt as to the fairness of the proceedings against him, and the sentence.

The Supreme Court, in the case of *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239 (1946), considered the problem of cumulative prejudicial error and determined that error not rising to the standard of constitutional error must be viewed in terms of the impact that it might have had on the jury's decision in relations to the rest of the trial:

> [I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result apart from the phase affected by the error. It is rather, even so, whether the error had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand. *Kotteakos v. United States, supra*, 328 U.SD. at 765, 66 S.Ct. at 1248.

See also:

> *United States v. Rodriguez*, 585 F.2d 1234 (5th Cir. 1978); *United States v. Arias-Diaz*, 497 F.2d 165 (5th Cir. 1974), *cert. denied*, 420 U.S. 1003, 95 S.Ct. 1446 (1975); *Addison v. United States*, 317 F.2d 808 (5th Cir. 1963), *cert. denied* 376 U.S. 905, 84 S.Ct. 658 (1964).

The jury found Petitioner guilty of one count of violating the Hobbs Act and two counts of making false statements. Petitioner was convicted of having induced

John Braden to drill a well on his property, through fear of economic loss, for which he paid between $350.00 to $1,000.00 less than the cost, and of having two men on the county payroll at about $500.00 per month for approximately six months.

Yet despite Petitioner's age, and the fact that his record was not only previously unblemished but also distinguished by public service, and despite his serious medical history of heart disease, including extensive open heart surgery, the judge sentenced Petitioner to ten years imprisonment on Count One, and two years each on Counts Four and Five, to run consecutively, for a total of fourteen years, plus a $30.000.00 fine and costs of prosecution (15,000.00).

The trial judge did not state at the sentencing why he sentenced Petitioner so harshly. Immediately thereafter, however, he imposed new bond conditions. Although the judge's Memorandum Opinion gave no indication of his feelings about Petitioner or his reasons for the sentence, the Anent Appearance Bond Memorandum reflects that at the same time he imposed his sentence, Judge Cox apparently held strong personal feelings about Petitioner, which were in large part colored by patently erroneous information concerning him. After these proceedings terminated, Petitioner responded to some of these charges by letter to the Circuit Court, annexing the relevant documents to refute the baseless charges leveled against him by Judge Cox.

Of course, it is impossible to respond to such obviously prejudiced remarks as "He was married and raised a family by one wife and that relationship was terminated recently in divorce", except to point out that this comment,

which appears *apropos* of nothing else in the Anent Appearance Bond Memorandum, indicates a consideration by the trial judge of a matter totally inappropriate to sentencing.

More significantly, the trial judge states that Petitioner "had the general reputation of being wealthy; of owning property rather promiscuously in the area and having most of it, if not all of it, in names other than his own..." He then goes on to state as fact his erroneous belief that Petitioner made a habit of holding property in names of other people.

While this may at first appear more relevant to the bond than to sentencing, it is important to point out that Petitioner's personal wealth was very much at issue in the trial, and in fact, Petitioner testified both on direct and cross-examination to the land he owned. The judge's erroneous belief that he perjured himself during his testimony by 'hiding' ownership of property in the names of others, may have been a major consideration in sentencing. Petitioner had no opportunity to confront these erroneous beliefs and present evidence to dispute them.

Finally, and most disturbing, is the trial judge's representation that "I never knew him [Mr. Robinson] except by reputation." As was pointed out, this was simply untrue, since Petitioner had appeared before this judge in court proceedings in the past, and the judge had, in one highly publicized case, *United States v. Harrison County, Miss. et al*, held him personally liable for actions which the court characterized as "highly improper and officious."

It is submitted that the concealed bias and factual misconceptions held by the trial judge resulted in the gross

abuse of the trial judge's discretion and a deprivation of Petitioner's due process and Eighth Amendment rights. While, as a general proposition, Federal appellate courts "lack the power either to impose or to review sentences", *United States v. Denson*, 603 F.2d 1143, 1149 (5th Cir. 1979), exception is made when "arbitrary or capricious action amounting to gross abuse of discretion is involved...", or when sentencing is motivated by impermissible bias. *United States v. DeLaFerente*, 550 F.2d 309, 310 (5th Cir. 1977). See also *United States v. Calmenares-Hernandez*, 659 F.2d 39 (5th Cir. 1981), *cert. denied* U.S. 102 S.Ct. 979 (1981); *United States v. Hedman*, 630 F.2d 1184, *supra; United States v. Hayes*, 589 F.2d 811 (5th Cir. 1979) *reh'g* and *reh'g en banc denied* (1979). This limited role of appellate courts was enunciated in *United States v. Hopkins*, 531 F.2d 576 (D.C. Cit. 1976):

> "...appellate courts have a duty to scrutinize sentencing decisions to insure that they are not based on improper or unreliable information." *Id.* at 579580.

This principle of fairness has consistently been favored, and it has even been suggested that it may be appropriate for the trial court to state its reasons for sentence to facilitate effective review of the factors considered in imposing sentence. *United States v. Gamboa*, 543 F.2d 545 (5th Cir. 1976).

Most recently, the Fifth Circuit has stated:

> "The requirements of due process and fundamental fairness require that the defendant be given an opportunity to rebut the factual assumptions relied on by the judge." *United States v. Gonzales*, 661 F.2d 448, 498 (5th Cir. 1981), citing

> *United States v. Hodges*, 556 F.2d 366, 369 (5th Cir. 1977) *cert. denied*, 434 U.S. 1016, 98 S.Ct. 735 (1978).

In this case, Petitioner was not only denied an opportunity to respond to unfair and erroneous assumptions and beliefs held by the trial judge, but he was not even made aware of them until after sentencing.

On the date of sentencing, the Court's only comments directly concerning Petitioner and this case were made during the course of the post-trial motions held just prior to sentencing:

> "I think Mr. Robinson was a very good supervisor, I think this kind of treatment of the county, though is a kind of way of life on the Gulf Coast, because he's not the first supervisor I've had before me. He's the second or third one. I don't believe I got my thoughts over to the other supervisors..."

While deterrences of others is a legitimate factor to be considered at sentencing, it should not outweigh the consideration of Petitioner as an individual, a man the trial judge himself characterized as "a very good supervisor". See *United States v. Hayes, supra*, at 827, footnote 9. Just as an individual defendant cannot measure his punishment against that received by others, no single *individual* should be forced to bear the burden of past or putative crimes committed by others.

No sentence should be predicated upon the trial judge's personal bias, incorrect and unreliable information, or improper considerations. The sentence imposed on Petitioner in this case was, we respectfully submit, simply

unconscionable. It stands as a gross abuse of one trial court's discretion.

CONCLUSION

Wherefore, it is respectfully submitted that this Court should grant this Petition, and issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned counsel, do hereby certify that I have this day forwarded, via United States Mail, postage prepaid, a true and correct copy of the foregoing Petition for Writ of Certiorari to the Solicitor General, Department of Justice, Washington, DC, and to Honorable James Tucker, United States Attorney, P.O. Box 2091, Jackson, MS. 39530.

This, the 16th day of December, 1983.

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APPENDIX "A"

UNITED STATES of America,

Plaintiff-Appellee,

v.

Arlan Lamar ROBINSON,

Defendant-Appellant.

No. 82-4087

United States Court of Appeals,
Fifth Circuit

Feb. 28, 1983.

Defendant was convicted in the United States District Court for the Southern District of Mississippi, at Biloxi, William Harold Cox, J., of one count of extortion under the Hobbs Act and two counts of misrepresentation, and he appealed. The Court of Appeals, Politz, Circuit Judge, held that: (1) evidence that defendant county supervisor insisted, as a condition for contractor's getting county contract on new well, that contractor also drill well on defendant's farm was sufficient as to the Hobbs Act count; (2) evidence was sufficient to support the misrepresentation convictions in connection with use of county employees, paid in part with federal antirecession funds, to work on defendant's farm on county time; (3) certain notes made by county purchasing clerk at meeting of county supervisors were not admissible as records of regularly conducted activity, but error was harmless; (4) positing of charge as defendant's theory of the case does not automatically secure for defendant a judicially narrated

count of "his" facts and legal arguments; and (5) evidence of prior similar extortion attempt was probative on disputed issue of intent on the Hobbs Act count, but remand was required for on-the-record articulation by the trial court of inquiry as to whether the probative value of the evidence outweighed its prejudicial effect.

Convictions on counts IV and V affirmed; remanded with instructions as to count I.

Michael S. Fawer and Ronda Claire Lustman, New Orleans, La., for defendant-appellant.

James B. Tucker, Asst. U.S. Atty., Jackson, Miss., H. Marshall Jarrett, Atty., Crim. Div., Dept. of Justice, Washington, D.C., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

Before CLARK, Chief Judge, THORNBERRY and POLITZ, Circuit Judges.

POLITZ, Circuit Judge:

Arlan Lamar Robinson, convicted by a jury of one count of extortion under the Hobbs Act, 18 U.S.C. § 1951[1]

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[1] Section 1951(a) reads:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do

(Count I), and two counts of misrepresentation under 18 U.S.C. §§ 1001, 2[2] (Counts IV and V), appeals, challenging the sufficiency of the evidence, various evidentiary rulings and the court's instruction on immunity. Finding no reversible error on Counts IV and V, we affirm. Finding the record incomplete as to Count I, we remand with instructions.

Background Facts

Robinson, Supervisor for District Five, Harrison County, Mississippi, was indicted on five counts charging

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(Footnote 1 continued)

anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"Extortion" is defined in § 1951(b)(2) as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

[2] Section 1001 reads:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Section 2 reads:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, entices or procures its commission, is punishable as a principal.
(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

that he had abused his office for personal gain.[3] The Hobbs Act conviction involved water wells. John Braden, owner of Braden Pump and Well Service, was called in November 1978 to repair a well located in a county barn. When his efforts failed, Braden advised the Board of Supervisors that the county needed a new well.

Braden testified that Robinson contacted him and urged a private meeting at which Robinson insisted, as a condition for Braden's getting the county contract on the new well, that Braden also drill a well on Robinson's farm. According to Braden, Robinson stated: "Now, John, you can do this well if you'll figure it for enough to include your drilling a well up at my farm in Stone County for me." The old county well was only 400 feet deep, but Robinson reportedly told Braden to submit specifications for twice that depth in order to cover Robinson's new well, and to explain the greater depth by reference to other wells near the county barn which were 800-900 feet deep. The Board of Supervisors sought emergency bids and eventually awarded the contract to Braden.

Braden testified that he planned to avoid Robinson's scheme by drilling the county well to 800 or 900 feet, thereby using all of the county pipe and funding, leaving none for Robinson's well. But the drilling subcontractor ignored such instructions and stopped drilling the county well at 360 feet when water was reached. Braden testified that this turn of events left him no choice but to yield to Robinson's persistent urging and drill his well. Braden completed the Robinson well in January 1979, billing Robinson only $837.15, representing the excess cost over

[3] The jury acquitted Robinson on Counts II and III, which had alleged, like Count I, acts of extortion in violation of the Hobbs Act.

the county bid. Robinson thus saved several thousand dollars. Braden also repaired another well owned by Robinson, using a rebuilt pump from the original county well.

Counts IV and V charged that two Harrison County employees, Robert Daniels and Lennis Hudson, performed private farming and construction work on Robinson's farm while drawing a salary from the county made up in part from federal antirecession funds. The funds, authorized under the Intergovernmental Antirecession Assistance Act of 1977, 42 U.S.C. § 6721 *et seq.*, were provided to avoid layoffs of county employees and were not intended for private use.

Daniels was hired as a heavy equipment operator for the county. He testified Robinson told him to say that he was a night watchman at a gravel pit near the Robinson farm. Daniels performed private farm work, including road-building with county equipment, for three years after becoming employed by the county. Daniels estimated that during that period he worked only three months doing county work; the remainder of the time was spent working on Robinson's farm. Robinson personally delivered the county paychecks to Daniels at the farm.

Hudson was ostensibly employed as a grader operator for Harrison County. During one two-year span, 1977-79, he labored fulltime doing farm and construction work for Robinson under the latter's personal direction. In doing this work he used county equipment. Hudson testified that he did not work in the gravel pit during this time, except on occasional trips to get gravel for the foundation of Robinson's barn. Other witnesses confirmed that both Hudson and Daniels were working for Robinson during this period.

Sufficiency of the Evidence

Viewing the evidence in the light most favorable to the government, *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), and accepting all credibility choices and reasonable inferences the jury could have made to support its verdict, an appellate court may reverse only upon concluding that a reasonable jury would have been compelled to find that guilt was not proven beyond a reasonable doubt. *E.g., United States v. Saxton*, 691 F.2d 712 (5th Cir. 1982).

Robinson argues initially that the evidence falls short of factual sufficiency since Braden's testimony conflicted with the testimony of others and, at times, his own recollections. The jury was entitled to credt Braden's testimony over that of other witnesses. And since we must resolve credibility choices and inferences in favor of the jury's finding, we conclude that the jury was entitled to credit Braden's general credibility over his precise recollection of specific facts. Moreover, objective evidence, including a telephone log notation and the bill for Robinson's redrilled and replaced well charging only $837.15 and marked "for well repair," is consistent with Braden's testimony.

Robinson's challenge appears to ascribe the fraudulent conduct to Braden. This thesis was urged during cross-examination of witnesses and during argument to the jury. Implicit in the conviction is the jury's rejection of this defense—a choice we are not persuaded to overturn. The evidence need not exclude every reasonable hypothesis of innocence or be consistent only with a finding of guilt, since a jury is free to choose among reasonable constructions of the evidence. *United States v. Saxton*, 691 F.2d at 714.

Robinson also argues that the evidence is legally insufficient, urging that he had no actual power to control the bidding or award the contract. But more critical to an extortion attempt under the Hobbs Act is the reasonable belief of Braden that he would suffer economic harm if he failed to cooperate with Robinson. *United States v. Quinn*, 514 F.2d 1250 (5th Cir.1975), *cert. denied*, 424 U.S. 955, 96 S.Ct. 1430, 47 L.Ed.2d 361 (1976). Braden testified that he felt he had to participate in Robinson's scheme when it was proposed and that his subsequent efforts to avoid the scheme backfired. As with the factual sufficiency claim raised above, the jurors were informed of the relevant standards and their duty in this regard. The jury's serious performance of that duty is underscored by the acquittals on two counts. We conclude that the government produced evidence sufficient to support Robinson's conviction under the Hobbs Act.

The evidence is also sufficient to support the two convictions under 18 U.S.C. §§ 1001 and 2. Robinson concedes for the purposes of this appeal that Daniels and Hudson performed personal work on county time but argues that the government did not show the specific weeks in which federal funds were used nor prove actual concealment. The record establishes, however, that both men were paid by the county using federal funds during the general periods charged. Further, it cannot be gainsaid that Robinson's conduct, including his directions to the two workers that they lie about their assignments, gave rise to a reasonable inference of attempted active concealment, despite the number of people in the county who, according to Robinson, knew about the scheme.

Admissibility of Notes

On appeal Robinson objects to the admission and use of a page of handwritten notes, called the "Emerson notes" after their author, William Emerson, who regularly made such notes at meetings of the Board of Supervisors for his own use in his role as county purchasing clerk. The specific notes in question contained information concerning the new county well.[4]

The notes were introduced through T. J. Eure, the county's comptroller. The notes were attached to a packet of county documents introduced through Eure, who was qualified as county records custodian.[5]

We conclude that these noted may not be considered "records of regularly conducted activity," admissible under Rule 803(6), Federal Rules of Evidence,[6] absent a

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[4] The relevant portion of the notes reads:

> $5500 *Emerg.* New Well [at] Success Barn 600' 4"—Arlan stated he will call & have someone do it.—No quotes required—New info—received 3 quotes—see P.O. 12323.

[5] The notes were also used earlier during cross-examination of Robinson. At that time the government attempted to intorduce the notes, but Robinson's attorney insisted that they were already in evidence, as Defendant's Exhibit 2. Later the attorney objected to the notes for insufficient foundation, stating that the page "has never been identified by anybody, never offered through anybody who prepared the document...." With Eure on the stand subsequently establishing the factual background of the notes and Emerson's note-taking conduct, Robinson's attorney renewed his complaint that the notes were being identified by and introduced through Eure rather than Emerson.

[6] Rule 803(6), often called the "business records exception" for its originally-limited reach, excepts from hearsay proscriptions:

> A memorandum, report, record, or data compilation, in any

showing that Emerson regularly compiled them as part of his official duties. Eure's testimony verifying Emerson's note-taking habit may suffice to bring the notes under Rule 803(6), *see United States v. Colyer*, 571 F.2d 941 (5th Cir. 1978); *Coughlin v. Capitol Cement Co.*, 571 F.2d 290 (5th Cir.1978), but authentication alone is not enough. For the notes to be admissible under Rule 803(6), the government also had to establish that "it was the regular practice of that business activity" to have the notes made. This was not done.

Our conclusion that the Emerson notes should not have been admitted does not terminate the inquiry and mandate reversal. We must consider the impact of this evidence on the essential fairness of the trial. "[I]t is necessary to review the facts of the case and the evidence adduced at trial" to determine the effect of the erroneous admission "upon the conduct of the defense." *Fahy v. Connecticut*, 229, 230, 11 L.Ed.2d 171 (1963), *quoted in Harryman v. Estelle*, 616 F.2d 870, 876 (5th Cir.) (en banc), *cert. denied*, 449 U.S. 860, 101 S.Ct. 161, 66 L.Ed.2d 76 (1980).

The information contained in the notes came before

(Footnote 6 continued)

form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

the jury in properly-admitted documentary evidence and through the testimony of various witnesses, including Eure, who read into the record the official minutes of the meeting of the supervisors.[7] Admission of the notes did

[7] These minutes read:

> THERE came on this day for consideration by the Board of Supervisors the matter declaring that an emergency exists and it is necessary to install a water well and pump, and after due consideration and discussion Supervisor ARLAN ROBINSON moved the adoption of the following Order:
>
> ORDER DECLARING AN EMERGENCY EXISTING AND ORDERING EXPENDITURES FOR INSTALLING A WATER WELL, PUMP AND TANK NOT TO EXCEED FIVE THOUSAND FIVE HUNDRED DOLLARS, HARRISON COUNTY, MISSISSIPPI
>
> WHEREAS, Supervisor District 5 reported that the pump and water well at district 5 Office at Success was out of order; and
>
> WHEREAS, it is absolutely necessary that water facilities be available in the interest of the health and welfare of the personnel employed; and
>
> WHEREAS, the Board of Supervisors does hereby find and determine as follows:
>
> 1. That an emergency exists to install a water well and pump urgently required at the Beat 5 Office, and that the lack of such repairs is creating a health problem, and that such repairs are necessary to correct the unsafe condition.
>
> 2. That said repairs should be made without the necessity of advertising for bids because of the urgency thereof.
>
> 3. That said repairs should be authorized to be made at a cost not to exceed $5,500.00; it is, therefore,
>
> ORDERED BY THE BOARD OF SUPERVISORS AS FOLLOWS:
>
> SECTION 1: That an emergency exists to install a water well and pump which are urgently required at Beat 5 Office to correct a health problem and unsafe condition.
>
> SECTION 2: That because of the urgency of said situation, said repairs are hereby authorized without the necessity of advertising for bids.
>
> SECTION 3: That said repairs be, and the same are hereby authorized to be completed at a cost not to exceed $5,500.00.

not prejudice Robinson by changing the theory of his defense or by forcing him into an unwanted defense. *See Harryman v. Estelle,* 616 F.2d at 877. The fact that the notes were taken and were introduced had no effect on the other evidence which overwhelmingly supported the jury's verdict. As a consequence, admission of the Emerson notes constituted harmless error.

Refusal to Instruct on Defense "Theory"

Robinson maintains that the trial court erroneously declined to give his proposed instruction, entitled "Theory of the Defense," in its charge to the jury and that such a refusal constitutes reversible error.

A defendant is usually entitled to have the court instruct the jury on the defense's "theory of the case." *United States v. Conroy,* 589 F.2d 1258, 1273 (5th Cir.1979), *cert. denied,* 444 U.S. 831, 100 S.Ct. 60, 62 L.Ed.2d 40 (1980). This does not mean that any suggested instruction bearing the defense theory label must be given. The trial court may decline a suggested charge which incorrectly states the law, is without foundation in the evidence, or is stated elsewhere in the instructions. Further, the positing of a charge as the defendant's theory of the case does not automaticallly secure for the defendant a judicially narrated account of "his" facts and legal arguments. *United States v. Bush,* 599 F.2d 72 (5th Cir.1979) (*quoting United States v. Barham,* 595 F.2d 231 (5th Cir.1979.))

(Footnote 7 continued)

Supervisor WILLIAM J. McDONALD seconded the adoption of the said Order, whereupon, the President put the question to a vote with the result that all Members of the Board, present on this day, voted in the affirmative. The President then declared the motion carried and the Order adopted.

Robinson's proposed charge falls within the ambit of *Barham* and *Bush*. The trial judge did not commit reversible error in declining that charge.

Instruction on Immunity

The trial judge commented to the jury that he had not granted immunity to any of the witnesses, including a formal charge that advised:

> I've heard much talk before this Court about somebody having immunity. I want to state to this Jury that I have not been consulted and have not entered any kind of order at anybody's request giving anybody immunity in this case. So I say that nobody in this case has legal immunity.

Robinson's attorney questioned some of the government's witnesses concerning promises of immunity offered for their testimony, establishing that some witnesses received, or understood that they were to receive, informal immunity from prosecution. The judge's comments may be factually incorrect if they are understood to mean that no immunity, formal or informal, was given. Robinson argues that the comments undermined his cross-examination on the subject.

All but the last of these comments were prompted by Robinson's counsel, who stated several times that "for the record, under § 6002 and § 6003 only Your Honor, upon their request, may grant an immunity." Counsel emphasized that any immunity given may not have been formally or properly granted, apparently in an effort to put into question before the jury the government's procedures and conduct with their witnesses. We do not view the judge's

comments as "invited error," *see United States v. Gray*, 626 F.2d 494 (5th Cir.), *cert. denied*, 449 U.S. 1038, 101 S.Ct. 616, 66 L.Ed.2d 500 (1980), since the judge's final charge may be seen as taking counsel's suggestion one step further in implying that, factually, no immunity was given. Nonetheless, counsel's comments are relevant to our determination of how the jury would likely understand the immunity issue and interpret the judge's comments regarding his role and involvement.

We are convinced that the jury was not confused by the issue of immunity or the judge's comments. Most of the immunized witnesses testified only as to the two counts on which Robinson was acquitted. Robinson's attorney had ample opportunity to explore possible bias and in fact acted upon the opportunity with vigorous questioning which revealed the government's activities and promises. *Cf. United States v. Hall*, 653 F.2d 1002 (5th Cir.1981) (reversing trial judge for preventing exploration of the immunity issue). No justified claim can be made that counsel was thwarted in his effort, and the record and jury's disposition reflect that the effort was not negated by the judge's comments. We would expect reasonable jurors to believe that it is the witness's *understanding* rather than the technical status of formal immunity, or the judge's role in the matter, which is relevant to the issue of credibility. This jury apparently so believed.

In the context of counsel's exploration of the issue and assertions regarding official immunity, the judge's comments may not reasonably be taken as indicting counsel's credibility on the issue. We find the charge as a whole and in the trial context to be neither misleading nor prejudicial, *see United States v. Bartlett*, 633 F.2d 1184, 1189 (5th Cir.), *cert. denied*, 454 U.S. 820, 102 S.Ct. 104,

70 L.Ed.2d 91 (1981), and conclude that no reversible error was committed.

Admission of "Similar Acts" Testimony

The government called John Baltar, a land speculator, to testify concerning an incident with Robinson three years before the matters charged in the indictment. Over the objection of Robinson's attorney, Baltar testified that Robinson had contacted him to discuss the county's proposed purchase of his property for a new road which would create valuable corners. Baltar testified that Robinson conditioned the purchase upon Baltar's giving him three acres of the property on one of the corners. Baltar refused, eventually selling the land to the county, after redistricting, through a different supervisor.

Robinson argues that Baltar's testimony should have been excluded as improperly placing evidence of extrinsic offenses before the jury, under Fed.R.Evid. 404(b). That rules makes evidence of "other wrongs" inadmissible to prove character but allows its use to show such factors as motive, opportunity, intent and plan.[8] The evidence must be relevant to an issue other than propensity, *United States v. Beechum*, 582 F.2d 898 (5th Cir.1978) (en banc), *cert. denied*, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979). Robinson urges that Baltar's testimony related

[8] Rule 404(b), entitled "Other crimes, wrongs, or acts," reads:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

only to Robinson's character and was thus inadmissible. Under the *Beechum* analysis, however, the eviddence may be used to show Robinson's intent if it is: (1) relevant to the charged crime, and (2) not unfairly prejudicial.[9]

Initially, we find the evidence developed through Baltar sufficient to establish the "other act." *Beechum* considers the "other act" to be established when the jury could reasonably so find. *Id.* at 913. That test is met on this record. Moreover, the incident with Baltar is sufficiently similar to the extortion attemtps charged under the Hobbs Act to be probative on the disputed issue of Robinson's intent. It is relevant in the evaluation of Robinson's testimony that he paid Braden for drilling the well on his farm and to the question whether Robinson misused his office for personal gain.

Finding the evidence relevant does not end our inquiry, for we must overlay the second part of the *Beechum* rubric and determine whether its probative value is substantially outweighed by the danger of unfair prejudice. In making this overlay we, unfortunately, are not aided by an on-the-record analysis of the probative value/prejudice issue by the trial judge.

An express scaling on-the-record of probative value and prejudice would tend to ensure appropriate consideration at trial of all relevant factors, establish the basis for the court's ruling, and provide the needed record for proper appellate review. On-the-record findings and conclusions

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[9] *Beechum* teaches that "the second step of the analysis required by rule 404(b) [is] whether the evidence satisfies rule 403." 582 F.2d at 913. Fed.R.Evid. 403 prescribes in pertinent part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...."

would thus further the efforts of both the trial and appellate court to follow the Rule 404(b) analysis mandated by *Beechum*.

In *United States v. Preston*, 608 F.2d 626 (5th Cir.1979), *cert. denied*, 446 U.S. 940, 100 S.Ct. 2162, 64 L.Ed.2d 794 (1980), we held that a trial court "must make an on-the-record finding that the probative value of admitting a prior conviction outweighs its prejudicial effect before admitting anon-609(a)(2) prior conviction for impeachment purposes under Rule 609(a)(1)." *Id.* at 639. The concerns discussed in *Preston* are pertinent to our instant inquiry for evidence of extrinsic offenses is to be used only with the caution commanded.

Since *Preston*, we have frequently considered the application of Rule 404(b) to extrinsic offense evidence.[10] We have never specifically addressed the question whether *Preston's* requirement of an on-the-record determination

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[10] These cases fall into separate categories. In some it appears that the trial court expressly outlined the *Beechum* analysis, and the decision was affirmed as within the trial court's discretion. *E.g., United States v. Wilkes*, 685 F.2d 135 (5th Cir.1982); *United States v. Emery*, 682 F.2d 493 (5th Cir.1982); *United States v. Renteria*, 625 F.2d 1279 (5th Cir.1980). *Cf. United States v. Guerrero*, 650 F.2d 728 (5th Cir.1981) (evidence clearly inadmissible under *Beechum*). In others, it appears that the trial court did not articulate its reasoning, but on appeal we made the *Beechum* analysis and found the evidence admissible. *E.g., United States v. Clemons*, 676 F.2d 122 (5th Cir.1982); *United States v. Wasler*, 670 F.2d 539 (5th Cir.1982). And in other cases in which we affirmed rulings on admissibility it is not clear whether the trial court made an initial determination or not. *E.g., United States v. Phillips*, 664 F.2d 971 (5th Cir.1981), *cert. denied*, __ U.S. __, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982); *United States v. Killian*, 639 F.2d 206 (5th Cir.), *cert. denied*, 451 U.S. 1021, 101 S.Ct. 3014, 69 L.Ed.2d 394 (1981); *United States v. Benton*, 637 F.2d 1052 (5th Cir.1981); *United States v. Green*, 634 F.2d 222 (5th Cir.1981); *United States v. Ible*, 630 F.2d 389 (5th Cir.1980).

of prejudice under Rule 609 must be applied in a Rule 404(b) setting. We conclude that the intendment and purpose of the prejudice elements in Rules 609 and 404(b) are sufficiently akin to warrant in Rule 404(b) cases as on-the-record articulation by the trial court of *Beechum's* probative value/prejudice inquiry when requested by a party.[11] In the absence of on-the-record findings in response to such a request, we will be obliged to remand unless the factors upon which the probative value/prejudice evaluation were made are readily apparent from the record, and there is no substantial uncertainty about the correctness of the ruling. *Shows v. M/V Red Eagle*, 695 F.2d 114 (5th Cir.1983).

Review of the record leads to uncertainty concerning the admissibility of Baltar's extrinsic offense testimony. Robinson's attorney moved *in limine* for exclusion of this testimony, repeating his objection when Baltar was called to the stand by the government, and requesting an opportunity to be heard. The objection was overruled without discussion and without explanation. There was no inquiry into the prejudice-probity contrast. As a consequence, we cannot determine whether *Beechum* is satisfied.

The uncertainty in the record requires a remand for further consideration by the trial judge. The judge is to

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[11] Although focused primarily on the probative value/prejudice weighing, it is apparent that the other elements in the *Beechum* test are so interwoven that those elements necessarily will be considered. *See* 582 F.2d at 914.

Since *Beechum* requires that the Rule 404(b) analysis include the otherwise-discretionary prejudice determination under Rule 403, we do not address the necessity of on-the-record determinations on *general* questions of probity and prejudice under Rule 403. *See Preston*, 608 F.2d at 639 n. 16.

determine whether the evidence's prejudicial effect outweighed its probative value and, if son, whether there is a reasonable possibility that this evidence affected the outcome of the case. This determination by the trial court on remand may be readily made, for the judge is cognizant of all necessary facts. No undue delay should be experienced. We intimate no suggested resolution, entrusting this matter initially to the trial judge.[12]

Sentencing

As his final assignment of error Robinson attacks the 14-year sentence and $30,000 fine imposed under the three convictions. A strict standard of review applies to a trial court's decision on sentencing. "Absent an illegal sentence or a gross abuse of the trial judge's broad discretion we will not disturb a sentence on appeal." *United States v. Noll*, 600 F.2d 1123, 1130 (5th Cir.1979). Robinson has the burden to show that at the time of sentencing the court abused its discretion or relied upon materially untrue information. *United States v. Garcia*, 693 F.2d 412 (5th

[12] The trial judge shall certify to us his findings and conclusions. The record shall be supplemented by the on-the-record determination herein prescribed, and by any materials submitted by the parties to the district court. Following such filing, the clerk will set a schedule for supplementary briefing and the matter will be returned to this panel for disposition.

The convictions under §§ 1001, 2 (Counts IV and V) will stand affirmed, irrespective of the ultimate disposition of Count I. Baltar's testimony related specifically to the three Hobbs Act charges, only one of which is before us today. The effect of this evidence on Counts IV and V is merely peripheral; to the extent it may there have been considered, its impact can only be harmless, given the overwhelming evidence of guilt. *See Harryman v. Estelle*. Further, we are convinced that this jury properly understood its duty to consider each count separately and on its own merits, as reflected by the two acquittals. We find no reversible error in any assignments of error on Counts IV and V.

Cir.1982). That burden has not been met.

The convictions on Counts IV and V are AFFIRMED. The matter if REMANDED WITH INSTRUCTIONS as to Count I.

APPENDIX "B"

UNITED STATES of America,

Plaintiff-Appellee,

v.

Arlan Lamar ROBINSON,
Defendant-Appellant.

No. 82-4087

United States Court of Appeals,
Fifth Circuit

Aug. 17, 1983.

After the Court of Appeals, 700 F.2d 205, affirmed and remanded defendant's conviction in the United States District Court for the Southern District of Mississippi, William Harold Cox, J., the district court certified record, and the Court of Appeals, Politz, Circuit Judge, held that trial court did not abuse its discretion in permitting witness' evidence on extraneous offense.

Affirmed.

Appeal from the United States District Court for the Southern District of Mississippi.

Before CLARK, Chief Judge, THORNBERRY and POLITZ, Circuit Judges.

POLITZ, Circuit Judge:

On initial consideration of this appeal we affirmed the conviction of Arlan Lamar Robinson for violations of 18 U.S.C. §§ 1001, 2 (Counts IV and V), deferred decision on the conviction for extortion under the Hobbs Act, 18 U.S.C. § 1951 (Count I), and remanded for further findings and conclusions by the district court, 700 F.2d 205. Specifically, we directed that the trial judge spread upon the record of this case, certifying to this court, his findings and conclusions relative to the extrinsic offense evidence elicited from the witness John Baltar, in light of the teachings of *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920, 99 S.Ct. 1244, 59 L.Ed.2d 472 (1979), and the directives of Rules 403 and 404(b), Federal Rules of Evidence. We have now been favored with the trial court's certificate, the proceedings before the district court on remand, and the supplemental briefs of the parties.

The trial court finds that the testimony by Baltar implicating an extrinsic offense by the defendant was relevant and its prejudicial effect did not outweigh its probative value. After again reviewing the Baltar testimony, and considering the supplemental filings, the colloquy of counsel and the district court on remand, the supplemental briefing before this court, and the trial court's certificate, we are constrained to hold that the trial judge did not abuse his discretion when he permitted the Baltar evidence on the extraneous offense. The requirements of Rule 404(b), as explicated in *Beechum*, weighed in light of Rule 403, are marginally satisfied. Accordingly, we now hold that the record contains no reversible error as to Count I and that conviction is AFFIRMED.

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-4087

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARLAN LAMAR ROBINSON,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Mississippi

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ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion October 4, 5 Cir., 1983, __ F.2d __)

(October 19, 1983)

Before CLARK, Chief Judge, THORNBERRY and POLITZ, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the

Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

APPENDIX "D"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK
600 Camp Street
New Orleans, LA 70130

October 27, 1983

Mr. Clarence A. Pierce, Clerk
U. S. District Court
P. O. Box 369
Biloxi, MS 39533

No. 82-4087—USA vs. ARLAN LAMAR ROBINSON

(D. C. No. CR-S81-00003)

☐ Enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

☐ Enclosed to you only is a certified copy of the Rule 47.6 Decision in the above case issued as and for the mandate.

☑ The Court having denied the motion for stay of mandate, enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

☐ Having received from the Clerk of the Supreme Court a copy of the order of that Court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

☐ We have received a certified copy of an order of the Supreme Court denying certiorari in the above case. This Court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

☑ Copy of the Court's opinion.

☑ Original record on appeal or review. (17 vols. in 2 boxes)

☑ Original exhibits. (1 BOX RETURNED UNDER SEPARATE COVER)

☐ Bill of Costs approved by this Court. ☐ Copy enclosed to counsel.

Sincerely,

GILBERT F. GANUCHEAU, Clerk

By: _____
Deputy Clerk

cc: (Letter Only)
Hon. William Harold Cox
Mr. Michael S. Fawer
Mr. Peter Halat
Mr. James B. Tucker
Mr. H. Marshall Jarrett

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-4087

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARLAN LAMAR ROBINSON,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Mississippi

---

ORDER:

☑ The motion of Appellant, Arlan Lamar Robinson for ☑ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

☐ The motion of Appellant, Arlan Lamar Robinson for ☑ stay ☐ recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying

the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

☐ The motion of _____ for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

☐ The motion of _____ for a further stay of the issuance of the mandate is DENIED.

_____

UNITED STATES CIRCUIT JUDGE